Filed 4/26/12 In re Cristal S. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re CRISTAL S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. CRISTAL S, Defendant and Appellant.	A132615 (Del Norte County Super. Ct. No. JDSQ106084)

Cristal S. appeals from the order continuing her wardship and reinstating her to probation. She contends that substantial evidence does not support the juvenile court's finding that she had violated the conditions of her probation, particularly if the court considered material Cristal argues was erroneously received in evidence over her objections. We conclude this contention lacks merit, and affirm

BACKGROUND

On June 20, 2011, the probation officer of Del Norte County filed a supplemental petition, as authorized by Welfare and Institutions Code section 777, in which the probation officer alleged that Cristal S., a ward of the juvenile court since August 19, 2010, had violated two of the terms of her probation during June 2011 in that she "has left the home of her mother without permission," and "was absent from school on one or more days without excuse."

The brief contested hearing on the petition was held two days later, on June 22. Cristal's mother testified that Cristal lives with her, and she is "supposed to be home at night." If Cristal is not home at night, it is because her mother gave her permission. Asked "Are there times since June . . . when she has been out of the house at night without your permission?" the mother replied, "Well, she leaves but I let her go. Well, but since I work I do not know when she returns and comes to the house because I have to get up very early to go to work." Cristal is always home when the mother leaves for work at 6:00 a.m. Cristal has "recently . . missed school because she's been sick." On one day between June 13 and June 17, Cristal missed school because of a dental appointment. The mother was not "absolutely sure" that Cristal went to school on June 17.

Cristal's stepfather testified that on June 17 he reported to the probation officer that Cristal "had not been sleeping at the house" and had not been going to school for days. Specifically, Cristal had not been home on the 17th, which he knew because "I live there" and, more specifically, because "that day I checked and she was not there." According to the stepfather, Cristal "is not in the house very often," and "she just doesn't . . . abide by the rules."

The final witness was Jennifer Savoy, Cristal's probation officer. She testified that it is her practice to check "the juveniles" at the McCarthy School. She made such a check on the morning of June 17, spoke with the stepfather, and ascertained that Cristal was not present. The teachers at the school take daily note of which students are absent or tardy "and that's reported over to one of the secretaries who records that information in a ledger."

Ms. Savoy further testified that she reviewed the school's "records regarding Cristal [S.]'s attendance during June of this year." Over objection by Cristal's counsel, Savoy testified that Cristal had "six unexcused absences" in June. Ms. Savoy went to the school on June 17 because "I'd been sent an email in the morning that stated how many of my probationers," including Cristal, "were not there at school." Apart from the 17th, Ms. Savoy had no personal information that Cristal was absent from the school, as

indicated by the attendance records. However, she had received telephone calls from the school reporting Cristal's absences.

After hearing brief argument from counsel, the juvenile court ruled that "applying the burden of proof that is required for a probation violation hearing which is only preponderance of the evidence . . . the allegations are sustained."

REVIEW

The juvenile court correctly noted that the lenient preponderance of the evidence standard applies to juvenile probation revocation proceedings conducted pursuant to Welfare and Institutions Code section 777. (See *In re Eddie M.* (2003) 31 Cal.4th 480, 501.) In undertaking to attack the sufficiency of the evidence supporting the juvenile court's ruling, Cristal assumes a daunting burden: "The issue of sufficiency of the evidence in dependency cases is governed by the same rules that apply to all appeals. If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. [Citation.] We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Rather, we draw all reasonable inferences in support of the findings, view the record most favorably to the juvenile court's order, and affirm the order even if other evidence supports a contrary conclusion. [Citation.] The appellant has the burden of showing the finding or order is not supported by substantial evidence. [Citation.]" (*In re Megan S.* (2002) 104 Cal.App.4th 247, 250-251.)

Cristal's first contention, to quote the caption in her opening brief, is that "there was insufficient evidence to support the probation violation allegation that appellant left home without permission since her mother testified appellant had her permission to leave the house." If the mother's testimony was all the evidence produced, Cristal might, just might, have a prayer of success. But there is also the stepfather's testimony that on June 17 Cristal had not spent the night at home "doesn't . . . abide by the rules," which presumably means the rule against leaving the house without permission. Not only does this testimony neutralize the mother's testimony, it also constitutes substantial evidence in support of a finding sustaining the allegation that Cristal "has left the home of her

mother without permission." (Evid. Code, § 411; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 450-451.)

Cristal's second contention, again quoting the caption in the opening brief, is that "the trial court erred in admitting the school records reflecting appellant's class absences as the records were inadmissible hearsay and their admission violated appellant's due process right of confrontation." This argument proceeds from an erroneous predicate, namely, that the attendance records of the McCarthy School were in fact introduced in evidence. They were not. The reporter's transcript of the hearing shows only that Ms. Savoy testified about consulting the attendance records, and that she had the records with her when she testified. But the actual records were neither offered nor received in evidence. Ms. Savoy testified from her own personal knowledge that Cristal was not present at the McCarthy School on June 17. Again, that testimony alone constitutes substantial evidence in support of a finding sustaining the allegation that "During the month of June 2011, the minor . . . was absent from school *on one or more days* without excuse." (Italics added.) (Evid. Code, § 411; *In re Alexis E.*, *supra*, 171 Cal.App.4th 438, 450-451.)

In support of his second contention, Cristal's appointed counsel has constructed an elaborate argument based on *Crawford v. Washington* (2004) 541 U.S. 36, and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305. However, this court has already concluded—on a prior appeal from another revocation of Cristal's probation—that the 6th Amendment's confrontation guarantee as construed in *Crawford* does not apply to juvenile probation revocation hearings. (See *In re Cristal S.* (Aug. 24, 2011, A130261) [nonpub. opn.] 2011 WL 3759698 *2 ["Appellant's claims based on *Crawford* and *Melendez-Diaz* fail because the Sixth Amendment right to confrontation does not apply to probation revocation hearings. (*People v. Gomez* (2010) 181 Cal.App.4th 1028, 1039; *People v. Abrams* (2007) 158 Cal.App.4th 396, 401; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411.)"].)

Our prior opinion is also pertinent to Cristal's arguments that the attendance records were hearsay not made admissible by the business record exception of Evidence Code section 1271.

" 'Due process does not prohibit the "use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence" accompanied by "reasonable indicia of reliability." ' (*People v. Gomez*, at p. 1034.)

"Documentary evidence is admissible at a probation revocation hearing where, rather than providing a substitute for live testimony such as statements to a probation officer by victims or witnesses, the evidence 'involves more routine matters such as the making and keeping of probation appointments, restitution and other payments, and similar records of events of which the probation officer is not likely to have personal recollection and as to which the officer ' "would rely instead upon the record of his or her own action." ' (*People v. Abrams, supra,* 158 Cal.App.4th at p. 405, quoting *People v. Arreola* (1994) 7 Cal.4th 1144, 1157.)

"*People v. Abrams, supra,* 158 Cal.App.4th 396, for example, found admissible a probation officer's testimony that (1) a different probation officer's report stated the officer had ordered the defendant to report on a certain date and the defendant had not done so, and (2) the department's computer records showed the defendant had not called the department. (*Id.* at pp. 398–399, 401, 404–405.) *People v. Gomez, supra,* 181 Cal.App.4th 1028, affirmed the revocation of the defendant's probation based on a probation report that relied upon ' "electronic probation records" ' showing the defendant failed to report to the department as required, make restitution payments, or submit verification of his employment and attendance at counseling sessions. (*Id.* at pp. 1038-1039.) *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066, found admissible a single-page report from the program manager of a counseling program the defendant was required to attend, which stated that the defendant had been terminated due to ' "Too Many Absences" ' and had completed ' "0 of 20 sessions." '

"The challenged evidence in the present case is of a similar nature: The email and the log sheets simply documented that appellant failed to supply a urine sample on three specific dates. Jackson's description of the procedures used by the Department to keep track of minors' urine testing demonstrated the reliability of the log sheets for this purpose; testimony from the officer who supervised the testing on a given date ' "likely would not have added anything to the truth-furthering process," ' as the evidence concerned 'events of which the probation officer is not likely to have personal recollection and as to which the officer "would rely instead upon the record of his or her own action." ' (*People v. Gomez, supra,* 181 Cal.App.4th at p. 1038, quoting *People v. Abrams, supra,* 158 Cal.App.4th at pp. 404–405.)" (*In re Cristal S., supra,* 2011 WL 3759698 *3.)

In any event, admission of Ms. Savoy's testimony about the attendance records, or the actual records, would not require reversal.

Although at the hearing Cristal objected on the basis that Ms. Savoy was not "a custodian of records," she does not renew that particular objection here. Another objection was "there's a foundational issue," which presumably meant that an appropriate foundation—possibly including Ms. Savoy's status as a non-custodian—had not been established. Cristal now argues: "In this case, the prosecution failed to call a custodian or *other qualified witness* [see Evid. Code, § 1271, subd. (c)] to lay any foundation for admissibility of the school attendance records under the business records exception. There was no evidence the school attendance records were prepared in the regular course of business. No evidence that the records were prepared at or near the time of the alleged school absences. Without a custodian or other proper witness, there was no evidence of the mode of preparation of the school attendance records. Lastly, there was no evidence to establish that the mode of preparation and sources of the information were such as to indicate trustworthiness of the attendance records. As such, the school attendance records did not qualify for admission under the business records exception to the hearsay rule." (Italics added.)

Admission of a record under Evidence Code section 1271 requires a showing that the record was made in the regular course of the business or entity, at or near the act, event, or condition, and that the method of preparation indicate its trustworthiness. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1176-1177; *People v. Dean* (2009) 174 Cal.App.4th 186, 197, fn. 5.) Whether the proponent of a record has established a sufficient foundation is a matter committed to the trial court's broad discretion, and its decision will be reversed only for a clear showing of abuse. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1011.)

Ms. Savoy was asked whether she was familiar with how attendance was reported at the McCarthy School. She answered: "They—the teachers will go and see who's present and who's not. The students that aren't present, they write their names on the board. If they called in sick or late those are also noted, and that's reported over to one of the secretaries who records that information in a ledger and it's also reported to the Educational Options Office, . . ." which "[¶] . . .[¶] . . . handle[s] the records for alternative education students [at] . . . McCarthy." "[T]he teacher notes the presence or absence of an individual . . . the day that it occurs." "[M]ost of the information's recorded by 9:00, but it's updated. Sometimes kids don't show up until an hour or so later and then that information is updated." Savoy knew the procedures because until up until May, "I used to be out there . . . most of the day" supervising "my probationers," and because "I'm required to know how to read those records to be able to supervise the children on probation." On the stand, Savoy was able to decipher markings on Cristal's "record of attendance" at McCarthy. This testimony would support a finding that she was a "qualified witness" within the meaning of Evidence Code section 1271, and that she satisfied the other foundational requirements.

Keeping attendance records is mandatory for schools because educational funding is pegged to daily pupil attendance. (Ed. Code, §§ 1244, 41020, subd. (c), 42127, 44809, subd. (b), 46000, 46010.3, 46300; Cal. Code Reg., tit. 5, § 19817.2.) This is sufficiently well known that the juvenile court implicitly treated it as a matter of common knowledge. (Cf. *People v. Dorsey* (1974) 43 Cal.App.3d 953, 960 ["It is common knowledge that

bank statements on checking accounts are prepared *daily* and that they consist of debit and credit entries based on the deposits received, the checks written and the service charges to the account"].) Records have been routinely admitted to prove or disprove a person's presence or absence at a given time and location. (E.g., (*People v. Hovarter*, *supra*, 44 Cal.4th 983, 1010-1011 [workplace "logsheets"]; *People v. Remiro* (1979) 89 Cal.App.3d 809, 846-847 [gun club sign-in sheet; *People v. Erving* (1961) 189 Cal.App.2d 283, 290-292 [hotel register]; *People v. Richardson* (1946) 74 Cal.App.2d 528, 542 [employee time card]; cf. *Fox v. S.F. Unified School Dist*. (1952) 111 Cal.App.2d 885, 891-892 [school personnel records used in terminating probationary teacher].) Moreover, there are *People v. Gomez*, *supra*, 181 Cal.App.4th 1028, *People v. Abrams*, *supra*, 158 Cal.App.4th 396, and *People v. O'Connell*, *supra*, 107 Cal.App.4th 1062, already mentioned.

In light of the foregoing, if Cristal's attendance records had been offered and received in evidence, we would be unable to conclude that the juvenile court abused its discretion. (*People v. Hovarter*, supra, 44 Cal.4th 983, 1011.)

The order is affirmed.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.